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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 364

ST. JOE PAPER COMPANY, a corporation,

Petitioner,

vs.

HARTFORD ACCIDENT AND INDEMNITY COMPANY, corporation, and THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation,

Respondents.

REPLY BRIEF FOR PETITIONER

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The question raised by the petition for certiorari is whether the submission to the jury of an issue not made by the pleadings and not tried by the express or implied consent of the parties constitutes such a departure from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision. The respondents, rather than meeting this question head-on, have resorted to the diversionary tactics which have served them so well throughout this litigation.

Thus, the respondents contend in their respective briefs that some of the evidence introduced at the trial was relevant to the issue of whether petitioner had knowledge or information "that all or part of the commissions were being

transmitted to . . . Anchor Hocking Glass Corporation or persons connected with Anchor Hocking Glass Corporation . . . "* and that the only way this Court can determine whether that evidence was received in such a manner as to give rise to an implied consent by the parties to a trial of that issue is for this Court to review the evidence, a task which this Court does not ordinarily undertake.

But, no review of the evidence by this Court is, in fact, necessary. Throughout all stages of this litigation, the petitioner's basic position has been that it is entitled to recover from the insurance companies because its employee, Jones, whose fidelity the insurance companies assured, had caused petitioner to pay its funds to him by representing to petitioner that the payments were being made to a third party as a necessary business expense. The respondents have continually countered this charge with a contention that petitioner should not recover because it *thought* or *believed* that the payments were being made to a third party in violation of the Robinson-Patman Act. When the respondents first boldly and plainly stated this contention,** its insufficiency as a defense was readily recognized and the defenses asserting that contention were stricken (R. 75).

The striking of the defenses based on the contention that plaintiff thought or believed that payments were being made in violation of the Robinson-Patman Act should have put an end to that bugaboo, as indeed the trial judge indicated it had.*** Thereafter, no evidence was submitted by either party

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* The District Court's erroneous instruction (R. 782).

** On the occasion of their filing amended answers asserting the contention as affirmative defenses.

*** "Robinson-Patman and all that went out the window . . . As a defense." (R. 82); "Robinson-Patman is out. That is not getting in at all." (R. 84).

on the issue tendered by the stricken defenses. The petitioner, however, being faced with the contention raised by the remaining defenses that it knew or had information of Jones' fraudulent and dishonest acts, did elicit admissions from Jones that he had written documents and made statements for the purpose of concealing the fact that the commission payments were coming to him and for the purpose of disguising the identity of Box Sales Agency as his alter ego. And Jones, in making such admissions, did contend that the documents written by him and the statements made by him were desired and accepted by the petitioner because petitioner thought the payments were being made in violation of the Robinson-Patman Act and wanted Jones to disguise and conceal the identity of Box Sales Agency. In other words, Jones said, "I lied to my employer, but this was all right because my employer couldn't face what it thought to be the 'truth' (which was not, in fact, the truth) and hoped I would lie."

Because Jones persisted in injecting this psuedo-justification into his testimony although it had been rejected as a defense, harmful error resulted from the trial judge's submitting to the jury, as a defense to the action, the issue of whether petitioner had knowledge or information that some of the commission payments were going to Anchor Hocking or persons connected with Anchor Hocking. And, it is this pseudo-justification by Jones which must be the basis for the Court of Appeals' holding "that the evidence as adduced by the parties, under the supervision of the court, developed this issue . . . ." (359 F.2d at 584, Appendix to Petition, p. 20). It is the same psuedo-justification by Jones, and nothing else, which respondents refer to in their briefs in contending that there was evidence relevant to this issue. And, because this psuedo-justification was asserted by Jones in his answers given during cross-examination by petitioner, re-

spondents contend that the issue was tried with the implied consent of the parties.

If the Court agrees with the trial judge's ruling that the psuedo-justification is not a defense to the petitioner's claim, it necessarily follows that this Court must find that the trial judge's submission to the jury of an issue based on that psuedo-justification was such a departure from the accepted and usual course of judicial proceedings as to require this Court to exercise its power of supervision. In effect, the trial judge permitted the jury to base a verdict for the defendant on an issue which could not constitute a defense to the plaintiff's claim. No review of the evidence is necessary. The confusion and inconsistencies apparent in the Court of Appeals' three opinions amply demonstrate that this was a departure from the accepted and usual course of judicial proceedings which cannot be rationalized and justified and which this Court must rectify.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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